IN THE HIGH COURT OF JUDICATURE AT BOBBY
APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO.323 OF 1996

The State of Maharashtra ...Appellant.

V/s

1. Shaikh Ajij Shaikh
Musa, age 23 yrs.

2. Kamarunnisa w/o Shaikh
Musa age 48 yrs.

3. Shahnaz w/o Shaikh Sayid,
age 28 yrs.

4. Raziya w/o Shaikh Shabbir,
age 25 yrs.
(All residents of S.No.65, Hut
No.57, near Sweeper Colony,
Ayeshanagar, Malegaon,
District - Nasik.) ...Respondents.

ALONG WITH
CRIMINAL REVISION APPLICATION NO.162 OF 1996

Abdul Rahman Shaikh Supdu,
Age: Adult, Occ: R/at
House No.1, Ganesh Nagar,
Kusumba Road, Malegaon,
District - Nashik. ...Applicant.

V/s

1. Shaikh Ajij Shaikh Musa,
Age: 23 yrs.,

2. Kamarunnisa W/o Shaikh Musa,
Age: 48 yrs.,

3. Shahnaz W/o Shaikh Sajid,
Age: 28 yrs.,
4. Raziya W/o Shaikh Shabbir
Age: 25 yrs.
All Nos. 1 to 4 above R/at:
S.No.65, Hut No.57, Near
Sweeper Colony, Ayesha Nagar,
Malegaon, Dist. Nashik

5. State of Maharashtra ...Respondents

Shri A.S. Shitole, APP for the State.

Mrs. S.D. Khot, advocate appointed for respondents.

Shri A.K. Patil, advocate for applicant in Revision Application No. 162 of 1996 (Absent)

CORAM: V.G. PALSHIKAR
&
R.C. CHAVAN, JJ

DATED : 11TH JULY, 2005

COMMON ORAL JUDGMENT : (Per R.C.Chavan, J)

1. This judgment disposes of appeal by State and Revision by original complainant, challenging the acquittal of respondents by the learned Additional Sessions Judge, Malegaon for offences punishable under sections 498-A, 302 read with section 34, 304-B(2) or 306 read with section 34 of the Indian Penal Code.

2. Respondents came to be prosecuted after death of complainant's daughter Nargis of burn injuries. It was alleged that the respondents had made demand of Rs 5,000/- from parents of Nargis and on account of failure of her parents to satisfy this unlawful demand, respondents set Nargis ablaze in the morning of 25/9/1995. Before succumbing to her injuries in hospital, Nargis made a dying declaration stating about involvement of respondents in the ghastly act.

On report by her father, police registered an offence, arrested the accused, recorded the statement of witnesses and on completion of investigation charge-sheeted the accused before the learned Judicial Magistrate, First Class, Malegaon.

3. On finding that the accused had committed offences triable exclusively by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions at Malegaon.

4. The learned Additional Judge, Malegaon charged the accused for offences punishable under sections 498-A read with section 34, 302 read with section 34, 306 read with section 34 and 304(B)(2) of the Indian Penal Code. Accused pleaded not guilty and hence they were put to trial. Upon consideration of prosecution evidence, in the light of defence of denial of involvement, the learned Additional Sessions Judge acquitted the respondents - accused. As already stated, aggrieved thereby, this appeal and revision have been filed.

5. The learned Additional Public Prosecutor strenuously canvassed that the learned Additional Sessions Judge grossly erred in discarding the dying

declaration of Nargis on the wholly untenable ground that Nargis, being Muslim, would have ordinarily made a statement in Hindi, whereas the dying declaration was recorded in Marathi.

6. We have gone through the entire evidence and find that except for dying declaration, there is no evidence indicative of involvement of the respondents in crime. It may be seen that though the complainant had stated about demand of Rs 5,000/- or ill-treatment for inability to comply with this demand, there is no independent record or evidence of such demand having been made or Nargis having been subjected to ill-treatment on account of such demand. Allegations about unlawful demand and ill-treatment resulting from failure to fulfil that demand comes from P.W. 4 - Abdul Rehman and P.W. 7 - Banubi, parents of the victim, only after the unfortunate event took place. Therefore, possibility that the story about demand and harassment emanated only after the incident cannot be ruled out.

7. There are no eye witnesses to indicate as to how the victim sustained injuries. The victim's own account of having sustained burns after being doused with kerosene by respondents was tendered in evidence

by the prosecution through P.W.1 - Subhash Trivedi, Special Executive Magistrate. Shri Trivedi stated that on receipt of requisition at about 11.15 a.m. on 25/9/1995, he went to the hospital with policemen and requested Duty Medical Officer to state whether Nargis was in a position to make statement. Medical Officer examined her and declared that Nargis was fit to make statement and an endorsement to that effect was obtained from Medical Officer. Then Special Executive Magistrate proceeded to record a dying declaration in question and answer form. Recording of dying declaration was over at about 11.45. a.m. This is undoubtedly in Marathi.

8. P.W. 5 - Dr. Bhimrao Tribhuvan was the Duty Medical Officer who had made his endorsement on the dying declaration at Exhibit-26. He stated that the victim was admitted to hospital at about 11.10 a.m. He stated that, upon admission, he prepared case-paper and, apart from other treatment, injected 'calmpose' and 'Fortwin' simultaneously to the victim so that she may be sedated. According to him, the victim might have been sedated by about 11.40 a.m. since the injections take about 30 to 35 minutes to show the effect. Now if this be so, it is obvious that when the Special Executive Magistrate started recording

dying declaration at 11.30 a.m., the victim must be on the verge of being sedated and by the time recording of dying declaration was over, she should have passed out. Therefore, it is curious that the Medical Officer chose to certify that the victim was fit to make statement even after he himself had administered sedative about 20 minutes prior to such certification. It was necessary for the Medical Officer to ensure that the victim was properly oriented before she could make responsible dying declaration. In the state in which the victim was placed after being injected with sedative it is difficult to imagine that the victim would be well oriented to make proper statement.

9. P.W. 1 - Trivedi stated that he had put questions to the victim in Marathi and the victim had given replies in Marathi itself. P.W. 1 - Trivedi stated having taken care to have all her relatives being sent out but, in cross-examination, stated that all the relatives were standing just outside the Ward and were just one foot away from the bed of Nargis, when her dying declaration was recorded. If this was so, it will be difficult to conclude that there was no influence on Nargis when she made dying declaration at Exhibit-16.

10. P.W. 5 - Dr. Tribhuvan himself stated that he had interrogated Nargis in Hindi in the presence of one Sharifa, a nurse, when the victim was admitted to hospital. Now this interrogation by Dr. Tribhuvan in Hindi created a doubt as to whether Nargis was in a position to understand Marathi or to make statement in Marathi. Nargis had stated before Dr. Tribhuvan that she had sustained injuries while preparing food. This was the first account which Nargis gave of the incident to an independent authority. Dr. Tribhuvan, however, added that since number of persons were accompanying Nargis, she was in a puzzled state of mind and, therefore, sought to discount cause of injuries given by Nargis. This was not the job of Medical Officer. He was not supposed to explain as to why the victim gave particular answer or otherwise. In fact, if Nargis was puzzled when she stated that she has sustained injuries while preparing food as number of persons were accompanying her, she was on the verge of sedation when she stated that her husband and in-laws set her on fire, and was still just a foot away from the relatives.

11. In this state of evidence which was presented before the learned trial judge, with two competing versions of incident, both emanating from Nargis

herself, the version immediately upon admission was likely to be spontaneous and unlikely to be result of tutoring and, therefore, naturally, more reliable than the second version. The second version was therefore rightly rejected by the learned trial judge.

12. Since upon reappreciation of evidence, we find that the conclusions drawn by the learned Additional Sessions Judge meet the test of probabilities, we see no reason to interfere with the findings recorded by him. Consequently, Appeal by the State as well as the Revision preferred by the original complainant being devoid of merit, are dismissed.

(V.G. PALSHIKAR, J.)

(R.C. CHAVAN, J.)